IN THE

Supreme Court of the United States

October Term 1965

No. 658

ARMANDO SCHMERBER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the United States.

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Petitioner, Armando Schmerber, respectfully prays for a Writ of Certiorari to the Supreme Court of the United States, in order to review a judgment of the Appellate Department of the Superior Court for the County of Los Angeles, State of California, affirming Petitioner's conviction by the Municipal Court of the Los Angeles Judicial District, of the charge of driving on a public highway while under the influence of intoxicating liquor, and sentencing him to thirty (30) days in jail.

Opinions.

The trial court issued no formal opinion. The Appellate Department of the Superior Court issued no formal opinion but affirmed without opinion.

Jurisdiction.

The judgment of the Superior Court of the County of Los Angeles, State of California was entered on August 24, 1965. A timely petition for rehearing filed on August 27, 1965 was denied on August 30, 1965. (Appendix A and B respectively.)

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3).

Questions Presented.

I.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute a Violation of Due Process.

II.

Does the Taking of a Sample of Blood From a Person Over His Objection That Counsel Has Advised Him Not to Give Such a Sample Constitute a Denial of the Right to Counsel.

III.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute an Unlawful Search and Seizure.

IV.

Does the Introduction Into Evidence of a Person's Blood Sample or His Refusal to Take a Blood Test Constitute a Denial of the Privilege Against Self-Incrimination.

Constitutional Provisions Involved.

The Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution provide in part as follows:

FOURTH AMENDMENT

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ."

FIFTH AMENDMENT

". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty . . . without due process of law . . ."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT

". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

Statement of Case.

(a) How Federal Question Was Presented.

Petitioner, in pre-trial proceedings filed a written motion to suppress the evidence of the blood tests and all circumstances surrounding it including the refusal to take the test. The written motion asserted that the taking of the blood was a violation of the Fifth and Fourteenth Amendments to the United States Constitu-

tion. The motion was denied. [R. T. pp. 2-7.] The same motion was renewed during the trial and denied. [R. T. p. 101, lines 10-26, pp. 102-107.]

Petitioner's brief in the Appellate Department of the Superior Court of the County of Los Angeles asserted that the introduction of the evidence of the blood test as well as the testimony relating to the circumstances surrounding its taking, including the refusal, was a violation of Petitioner's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The Appellate Department of the Superior Court of Los Angeles County is the highest court in the State of California to which an appeal may be had from a Municipal Court wherein Petitioner was convicted.

(b) Petitioner was involved in an automobile accident when the car he was allegedly driving struck a tree. He was observed at the scene by a Los Angeles Police officer as Petitioner was being placed in the ambulance. [R. T. p. 68.] Petitioner received treatment at the hospital for various lacerations. He had a fractured ankle and two fractured ribs. (Appx. C.) While in the hospital the Los Angeles Police officer asked Petitioner to agree tc a blood sample. The Petitioner initially stated he would give a sample. Previous to the taking of the sample the Petitioner told the officer that he objected and would not give such sample since his attorney had advised him not to give such a sample.

[R. T. p. 97, line 26; p. 98, lines 1-20.] Additionally, Petitioner's affidavit supporting his motion for suppression was uncontradicted by the People and contained the statement that a further basis for his refusal was "because of my privilege against self-incrimination contained in the California Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution." (Appx. C.)

The officer directed the doctor to take the blood sample over Petitioner's objection. Although the officer testified he had arrested Petitioner previous to the request for extracting the blood the City Attorney had stipulated to the correctness of Petitioner's affidavit wherein it alleges that the arrest took place after the blood withdrawal. [R. T. p. 4, lines 5-6; Appx. C.]

The results of the blood test was introduced in evidence and an expert testified it showed the Petitioner was under the influence of intoxicating liquor. Of all the witnesses produced by the People who observed Petitioner, only the officers testified to his being under the influence. [R. T. p. 28, lines 6-12; pp. 33-53.]

REASONS FOR GRANTING THE WRIT.

I.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute a Violation of Due Process.

As stated in Chief Justice Warren's dissent in this Court's 5-4 decision in *Breithaupt v. Abram,* 352 U.S. 432:

> "In reaching its conclusion that in this case, unlike *Rochin,* there is nothing 'brutal' or 'offensive' the Court has not kept separate the component parts of the problem. Essentially there are two: the character of the invasion of the body and the expression of the victim's will; the latter may be manifested by physical resistance. Of course, one may consent to having his blood extracted or his stomach pumped and thereby waive any due process objection. In that limited sense the expression of the will is significant. But where there is no affirmative consent, I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest. The Court, however, states that 'the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right.' This implies that a different result might follow if Petitioner had been conscious and had voiced his objection. I reject the distinction.
>
> "Since there clearly was no consent to the blood test, it is the nature of the invasion of the body that should be determinative of the due process

question here presented. The Court's opinion suggests that an invasion is 'brutal' or 'offensive' only if the police use force to overcome a suspect's resistance. By its recital of the facts in *Rochin*—references to a 'considerable struggle' and the fact that the stomach pump was 'forcibly used' —the Court find *Rochin* distinguishable from this case. I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights.

"Apart from the irrelevant factor of physical resistance, the techniques used in this case and in *Rochin* are comparable. In each the operation was performed by a doctor in a hospital. In each there was an extraction of body fluids. Neither operation normally causes any lasting ill effects. The Court denominates a blood test as a scientific method for detecting crime and cites the frequency of such tests in our everyday life. The stomach pump too, is a common and accepted way of making tests and relieving distress. But it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. Would the taking of spinal fluid from an unconscious person be condoned because such tests are commonly made and might be used as a scientific aid to law enforcement?

"Only personal reaction to the stomach pump and the blood test can distinguish them. To base the restriction which the Due Process Clause imposes on state criminal procedures upon such reac-

tions is to build on shifting sands. *We should, in my opinion, hold that due process means at least that law enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth.*" (Emphasis added.)

This Court now holds that the Fifth Amendment is applicable to the States through the Fourteenth Amendment.

Malloy v. Hogan, 378 U.S. 1, 12 L. Ed. 2d 653, 85 S. Ct. .....

Thus, the argument that the Fifth Amendment doesn't apply to the States, which was the argument asserted by the majority in *Breithaupt*, is no longer a valid support.

Due Process to have a meaning, should unequivocally mean that police may not commit assault and battery on an accused person for the purpose of obtaining evidence to use against him. Why should this Court interpret the Constitution to allow physical evidence obtained as a result of battery (nonconsensual insertion of needle through skin) and theft (nonconsensual taking of personal property—blood) to be used against a defendant when it has held that obtaining oral incriminatory utterances by such means is violative of due process?

Brown v. Mississippi, 297 U.S. 278.

To attempt to draw such a distinction makes a mockery of the Constitution.

Under the present status of the law in California, and in many States, *Breithaupt* is the support for the police to invade person's bodies and extract what evidence they need to help them convict the accused.

People v. Duroncelay, 48 Cal. 2d 766;

State v. Berg, 76 Ariz. 96, 259 P. 2d 261;

State v. Cram, 176 Ore. 577, 160 P. 2d 283.

A decision by this Court is essential to clearly define and limit the claimed right of the police to invade the bodies of citizens and extract from them blood which in no way is contraband.

It seems unreasonable to say that only if the accused commits a crime[1] by physically resisting the withdrawal of blood does due process and *Rochin* apply. To follow this reasoning in effect would encourage commission of crimes by an accused in order to protect his constitutional rights. Such reasoning and result would be an anomaly.

This procedure is also violative of due process since it, in effect, amounts to forcing a person to admit to a crucial part of the People's case. If physical force or other objectionable practices were used to extract an oral or written admission or confession the admission or confession would be inadmissible.

Brown v. Mississippi, 297 U.S. 278;

Ashcroft v. Tennessee, 322 U.S. 143;

Mallory v. United States, 354 U.S. 449.

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[1]California Penal Code 148, 242, 243, 834a. These sections provide among other things, that one shall not resist, obstruct, or delay an officer in the discharge of his duties, nor shall one commit a battery on an officer or resist an arrest.

There is no valid distinction between such judicially condemned practices and the conduct of the police in this case. The result is the same—force is used to extract incriminating evidence from a person.

II.

Does the Taking of a Sample of Blood From a Person Over His Objection That Counsel Has Advised Him Not to Give Such a Sample Constitute a Denial of the Right to Counsel.

A defendant is entitled to an attorney at all stages of the proceedings.

Gideon v. Wainright, 372 U.S. 335 ....;

Escobedo v. Illinois, 378 U.S. 478;

Massiah v. United States, 377 U.S. 201.

When Petitioner advised the police he objected to the blood test because his attorney had advised him not to take it he was certainly exercising his right to counsel. [R. T. pp. 97-98.] How else can a defendant or anyone utilize advice given by counsel except by adhering to the advice given? Here, the conduct of the police in taking Petitioner's blood over his objection and contrary to his counsel's advice, effectively constituted a denial of the right to counsel. This type of conduct by the police if condoned gives the police the right to deny counsel to defendant because the end result is the same —If he doesn't have counsel he takes the test voluntarily—if he has counsel he takes the test involuntarily.

The value of *Escobedo* and *Massiah* are negated if the police can thusly overcome the right to counsel.

III.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute an Unlawful Search and Seizure.

Petitioner contends that there was an illegal arrest in this matter and that any resultant search was illegal. However, since the trial court held the arrest was legal Petitioner will assume this as true for the purposes of present argument herein.

The framers of our Constitution certainly would have repelled at the thought that someday police officers would claim a right to enter the body of a person, for the purpose of obtaining evidence against him which isn't even contraband, after they have made a lawful arrest. To follow the reasoning that such practice is constitutional, if proper medical means are followed, leads one to the conclusion that exploratory surgery of the abdomen would be proper to prove that a person had narcotics and had swallowed it. The "logic" becomes more frightening when it is realized that the police will be the ones making the decisions and not anyone else. Certainly we must face up to the obvious conclusion that puncturing the body constitutes an unreasonable search and seizure.

By recent decisions the Federal standards of search and seizure apply to the States.

Mapp v. Ohio, 36 U.S. 643;

Ker v. California, 374 U.S. 23.

IV.

Does the Introduction Into Evidence of a Person's Blood Sample or His Refusal to Take a Blood Test Constitute a Denial of the Privilege Against Self-Incrimination.

It seems fallacious to hold, as the California Courts have, that since the taking of blood doesn't amount to testimonial compulsion there can be no violation of the privilege against self-incrimination.

People v. Haeussler, 41 Cal. 2d 252.

Such an argument completely ignores the realities of the situation. Certainly a person is "giving" evidence against himself when blood is being extracted from his veins. What is the difference between forcing a defendant to testify he has consumed sufficient alcoholic beverages to become intoxicated or taking his blood and proving by its content that he has consumed that particular amount of alcoholic beverage?

It seems that the latter procedure is even more incriminating. An attempt to draw a *valid* distinction does not result in a reasonable answer.

Allowing into evidence the fact of refusal to take a breathalyzer and blood test and allowing comment on it penalizes a defendant for the assertion of his constitutional privilege against self-incrimination. [R. T. p. 110, lines 1-24; p. 263, lines 6-10.] The Court in advising the jury that they could consider all the evidence regarding the blood test indirectly advised the jury they could draw adverse conclusions from Petitioner's assertion of his right not to take any tests. Such an instruction effectively negates the constitutional right of the person asserting his rights and is contrary to the law.

Griffin v. California, 380 U.S. .....

Conclusion.

For the reasons herein stated, Petitioner respectfully urges that his Petition for Writ of Certiorari should be granted.

Dated: October 1965.

Respectfully submitted,

THOMAS M. MCGURRIN,
Attorney for Petitioner.

APPENDIX A.

Judgment.

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. Superior Court No. CR A6414, Trial Court No. 79883.

People of the State of California, Plaintiff and Respondent, vs. Armando Hoyas Schmerber, Defendant and Appellant.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. George M. Dell, Judge.

Filed Aug. 24, 1965.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment and order granting probation made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.
August 24, 1965.

By the Court.

McIntyre Faries
Acting Presiding Judge.

H. Eugene Breitenbach
Judge.

F. Ray Bennett,
Judge.

APPENDIX B.

Order Denying Rehearing and Denying Certification.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

The People of the State of California, Plaintiff and Respondent, vs. Armando Hoyas Schmerber, Defendant and Appellant. Superior Court No. CR A 6414, Trial Court No. 79883.

The petition of appellant for a rehearing after judgment of this court on appeal and petition for certification of cause to the District Court of Appeal in the above-entitled case having been filed and having been duly considered,

Said petitions are hereby denied.

MEMO.

Defendant has requested a rehearing or certification to the District Court of Appeal. In this case there was overwhelming evidence of intoxication, and the taking or non-taking of blood and testing the same was but a minor factor and not controlling. The position of appellant substantially is that (1) Article VI, § 4½, is not applicable, or if applicable is not to be applied and may be unconstitutional under the Federal constitution, (2) the California decisions re blood tests, etc., are not good law because they require the defendant to be a witness against himself and in this instance at least did violate his constitutional rights. Assuming that we

might think so at times, it is not the province of this court to take issue with decisions of the California Supreme Court or other high courts or to hold portions of the constitution of California unconstitutional. *Barr Lumber Co. v. Shaffer* (1951), 108 Cal. App. 2d 14, 22-23. 13 Cal. Jur. 2d 661-664, etc. *Akley v. Bassett* (1924), 68 Cal. App. 270, 228 P. 1057.

Dated August 30, 1965.

By the Court.

Faries
Acting Presiding Judge

Bennett
Judge

Breitenbach
Judge

APPENDIX C.

Affidavit.

State of California, County of Los Angeles—ss.

I, Armando H. Schmerber, say:

I am the Defendant in the case of People v. Armando, H. Schmerber.

On November 14, 1964, I was taken by ambulance to the Encino Hospital about 12:30 A.M. I was requested to submit to extraction of blood at the hospital at approximately 2:00 A.M. on November 14, 1964. I refused to allow the extraction of blood. Over my objection and at the order of one or more Los Angeles police officers, I believe Sgt. J. A. Smith and E. A. Slattery, my blood was taken from me against my will by a Dr. W. Brooks. I refused said taking of my blood because my attorney had advised me to refuse such a test, and because of my privilege against self-incrimination contained in the California Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution.

At the time of taking of the blood I had one broken rib, a fractured right leg and lacerations on my forehead and nose. At this time I was in severe pain and any movement by myself caused me great pain. As a consequence of the pain I could not and did not physically resist the taking of my blood.

I was arrested on November 14, 1964 by Los Angeles police officers some time after the taking of my blood for an alleged violation of Vehicle Code 23101.

I desire the return of my blood sample, all records of the result of any analysis of my blood sample, and suppression of any oral evidence of the results of said blood tests.

I declare under penalty of perjury the foregoing is true and correct.

Executed on January 26th, 1965
at Saugus, California.

Armando H. Schmerber /s/
Armando H. Schmerber